

Huang (Migration) [2018] AATA 5320 (26 October 2018)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr Hongwei Huang
Ms Qihui Zhai
Mr Yujia Huang

CASE NUMBER: 1716484

DIBP REFERENCE(S): BCC2017/746037

MEMBER: John Cipolla

DATE: 26 October 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicants Employer Nomination (Permanent) (Class EN) visas.

Statement made on 26 October 2018 at 4:23pm

CATCHWORDS

MIGRATION – Employer Nomination (Permanent) (Class EN) visa – Subclass 186 (Employer Nomination Scheme) – Direct Entry stream – ICT Project Manager – subject of an approved nomination – nomination application refused – false and misleading information in visa application – opportunity to check the provenance of sponsoring business – agency agreement – waiver of requirement – decision under review affirmed

3.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cls 186.213, 186.233; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Sran v MIBP [2014] FCCA 37

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 14 July 2017 to refuse to grant the applicants Employer Nomination (Permanent) visas under s.65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas on 24 February 2017. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.186.213 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
6. In the present case, the first named applicant (the applicant) is seeking the visa in the Direct Entry stream, to work in the nominated position of ICT Project Manager.
7. The delegate refused to grant the visas because the applicant did not meet cl.186.213 as the delegate determined that the applicant had provided false and misleading information in the application for the visa in breach of Public Interest Criterion 4020(1) of Schedule 2 to the Regulations because the applicant declared in the visa application that the sponsoring business LAT Australia Group Pty Ltd would be able to provide him with employment as a ICT Project Manager on a salary of \$182,000.00. Evidence before the Department indicated that the sponsoring business was not in a position to provide this employment to the applicant as it was not lawfully and actively operating.
8. The applicant lodged an application for review with the Tribunal on 28 July 2017.
9. On 15 August 2018 the Tribunal wrote to the applicant inviting the applicant to comment on information that the Tribunal considered could be the reason, or part of the reason, for affirming the decisions under review. The Tribunal in its letter noted that on 24 February 2017 the first named applicant had lodged an application for a Subclass 186 visa that is the subject of this review noting his wife and child as secondary visa applicants. The letter noted that on 9 June 2017, the nomination lodged by LAT Australia Group Pty Ltd, being the nomination for the purposes of the visa application, was refused by the Department of Immigration. The Tribunal noted that on 25 July 2018, the Tribunal had dismissed the application lodged by LAT Australia Group Pty Ltd. The Tribunal noted that on 9 August 2018, the Tribunal confirmed its dismissal of the application lodged by LAT Australia Group Pty Ltd and as a result, the decision under review was taken to be affirmed. The letter noted that the nomination relied on to satisfy cl.186.233 must be one which was made at the time of the visa application and therefore it was not possible to rely on another nomination.
10. The Tribunal received a response to this letter on 28 August 2018 seeking an extension of time to respond to the Tribunal's letter which was duly consented to. In the response received by the Tribunal which was provided by the applicant's representative, the applicant stated that he had tried his best to contact his former agent and sponsoring employer but was unable to do so. The applicant claimed to have suffered from serious financial and psychological damage as a result of migration fraud and the applicant was hoping that the case could be referred to the Minister.

11. CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in the present case is whether the applicant meets the requirements of cl.186.233. Further to this whether the applicant meets the requirements of cl.186.213(1) namely Public Interest Criterion 4020(1).

Nomination of a position

13. Clause 186.233 as applicable in this case is set out in full in an attachment to this decision. Essentially, it requires that the position to which the application relates be the subject of an application for approval of a nomination in the Direct Entry stream. The position must be one that was the subject of the declaration made as part of the current visa application. In addition, where the associated nomination was made on or after 1 July 2017, it must identify the applicant in relation to the position.
14. In addition, this criterion also requires that:
 - the person who will employ the applicant is the person who made the nomination
 - the nomination has been approved and has not been subsequently withdrawn
 - there is no 'adverse information' known to Immigration about the person who made the nomination or a person 'associated with' that person (within the meaning of r.1.13A and r.1.13B); or it is reasonable to disregard any such information
 - the position is still available to the applicant; and
 - the visa application was made no more than six months after the nomination of the position was approved.
15. On 9 June 2017, the nomination lodged by LAT Australia Group Pty Ltd, being the nomination for the purposes of the visa application, was refused by the Department of Immigration. On 9 August 2018, the Tribunal dismissed the application lodged by LAT Australia Group Pty Ltd for merits review and as a result, the decision under review was taken to be affirmed.
16. Therefore, cl.186.233 is unable to be met as the nomination application by LAT Australia Group Pty Ltd has not been approved.

17. Other criteria

18. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.186.213(1) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

19. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in a material particular?

20. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
21. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
22. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
23. The evidence before the Tribunal indicates that the applicant engaged an agent to pursue an application for permanent residence. The evidence indicates that the applicant would have known his way around the Australian immigration system as on 7 September 2011 the applicant was granted a Subclass 456 Temporary Business visa. The applicant arrived in Australia as the holder of this visa on 24 September 2011 and departed Australia on 30 September 2011. The Tribunal notes that this now obsolete visa subclass was granted to an applicant to enable them to enter Australia temporarily for business purposes. The grant of the visa required the Department being satisfied that an applicant had the personal attributes and business background that was relevant to and consistent with the nature of the applicant's proposed business in Australia and that an applicant needed to demonstrate that there was a need for them to be in Australia for business purposes. The evidence before the Tribunal indicates that the applicant was granted a subclass 600 visitor visa on 31 March 2016 and that he arrived in Australia on 20 February 2017 as the holder of that visa and has not departed Australia since that time.
24. The evidence before the Tribunal indicates that the applicant made the application for the visa on 24 February 2017. The evidence before the Tribunal indicates that the applicant was in Australia at the time that the visa application was lodged. The evidence indicates that the applicant, given the fact that he was in Australia at the time of lodgement of the visa application, would have had an opportunity to check the provenance of the sponsoring business and that the proposed position of ICT Project Manager was available to him.

25. The Tribunal accordingly finds based on the evidence before it that the applicant did knowingly provide false and misleading information to the Department in support of a Subclass 186 visa application. The Tribunal makes this finding on the basis of the following factors. The applicant as has been noted had experience with the Australian immigration system having applied for and being granted a Short Stay Business visa in September 2011. The applicant had also made an application for a subclass 600 visa which was granted to him on 31 March 2016. The applicant arrived in Australia on 20 February 2017 and had not departed Australia since that time. The applicant engaged an agent to make a permanent residence application on his behalf, the evidence indicates that the applicant provided his personal details and immigration history to the agent for that purpose. The Tribunal notes that evidence has been provided to it at folio 34 indicating that the applicant's agent had been sanctioned by the Migration Agents Registration Authority.
26. For the requirements in cl.4020(1) and (2) to be engaged, it is not necessary to show knowing complicity by the visa applicant in the fraud. This applies both to the provision of bogus documents, and information that is false or misleading in a material particular.
27. Where false or misleading information or a bogus document is given by an agent without the knowledge of the applicant, a question arises as to whether or not PIC 4020 is engaged. However, the weight of authority now makes it clear that the words 'given or caused to be given' do not import a mental element.¹ It is neither necessary for an applicant to be aware that false information has been given by the agent, nor that the applicant gave instructions to provide false information to the agent in order to be responsible for false or misleading information being given.²
28. Where an applicant lodges a visa application through an agent, the applicant, being a principal, will be bound under the common law principles of agency by the acts of an agent acting within the scope of his or her authority. Actual authority may be express or implied³ and a principal can be liable for the actions of an agent, even if the agent's act is unlawful or amounts to fraud.⁴ As a result, even where an applicant did not fill out an application form, he or she may be found to have caused false or misleading information to be given to a specified person, and thus not to have complied with PIC 4020, despite allegations of fraud by a migration agent.⁵
29. In *Sran v MIBP*⁶ the Court considered an applicant's claims that the false and misleading information, in this case a non-existent TRA skills assessment reference, was provided in the visa application as a result of migration agent fraud. In that case, the applicant had instructed the agent to lodge a visa application, a fee was discussed and the applicant knew that the visa application was to be made. The Court considered these facts were sufficient to

¹*Vyas v MIAC* [2012] FMCA 92 (Driver FM, 17 May 2012) at [68]. This view was endorsed in *Sran v MIBP* [2013] FCCA 37 (Judge Nicholls, 17 January 2014).

²*Singh v MIBP* [2015] FCCA 2776 (Judge Whelan, 14 October 2015) at [49].

³*Lysaght Bros & Co Ltd v Falk* (1905) CLR 443 as cited in *Sran v Minister for Immigration and Anor* [2014] FCCA 37 at para.66.

⁴*Brown v Citizen's Life Insurance Co Ltd* (1904) 2 SR (NSW) 202; *Lloyd (Pauper) Appellant v Grace* [1912] AC 716 as cited in *Sran* at paras.63 and 78.

⁵ For example, in *Singh v MIBP* [2015] FCCA 2776 (Judge Whelan, 14 October 2015), the Court found at [56] that 'it is consistent with the conclusions of Buchanan J in *Trivedi* that the provisions of s.98 of the Act should apply to PIC 4020 and that an applicant should be deemed to have completed an application form where he or she causes a form to be filled out or his/her behalf'

⁶ [2014] FCCA 37 (Judge Nicholls, 17 January 2014).

ground the Tribunal's finding that an agency agreement was established for that purpose and that the visa application was validly made.⁷

30. The evidence indicates that the applicant entered into an agreement which served an objective of facilitating permanent residence to Australia. The applicant had an immigration history having travelled to Australia in 2011 as the holder of a Subclass 456 Short Stay Business visa. The applicant was in Australia at the time of lodgement of the application that is the subject of this review. The applicant engaged an agent to lodge an application for permanent residence on his behalf and had would have been able to check the provenance of the nominating business and ensure that a position was available to him at a salary of \$182,000.00.
31. The cumulative consideration of all of these factors leads the Tribunal to find that the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

32. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
33. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
34. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
35. There is no evidence before the Tribunal which establishes the existence of compelling circumstances affecting the interests of Australia or compassionate and compelling reasons that affect the interests of an Australian citizen, and Australian permanent resident or eligible New Zealand citizen.
36. Therefore the requirements of PIC 4020(1) should not be waived.
37. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.186.213(1).

DECISION

38. The Tribunal affirms the decision not to grant the applicants Employer Nomination (Permanent) (Class EN) visas.

John Cipolla
Senior Member

⁷*Sran v MIBP* [2013] FCCA 37 (Judge Nicholls, 17 January 2014) at [44], [53], [64] and [78]. See also *Singh v MIBP* [2014] FCCA 1816 (Riethmuller J, 20 August 2014).

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...